Vinaga Moorthy a/l Gopal v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO B–05–48 OF 1997

GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ARIFFIN ZAKARIA JJCA

23 SEPTEMBER 2002

Criminal Law *— Penal Code — s 304 — Punishment for culpable homicide not amounting to murder — Sentence of 12 years imprisonment — Whether learned judge took into account the appellant's plea of guilt when passing sentence — Whether sentence was manifestly excessive*

The appellant was charged, convicted and sentenced for an offence under s 304 of the Penal Code. The gist of the charge was that the appellant together with six other persons had with common intention committed culpable homicide by causing the death of one Rajasegaran. The appellant and two others were produced before the High Court and charged. All three pleaded guilty. The learned judge found the appellant guilty, convicted him and imposed a sentence of 12 years imprisonment. Counsel for the appellant stated that the learned judge failed to take into account the fact that the appellant had pleaded guilty and went against the trend of sentences usually handed down in a case such as this by the criminal courts. The appellant appealed against the sentence. The issue was whether the sentence was manifestly excessive.

Held, dismissing the appeal and affirming the order by the learned judge:

The Court of Appeal had considered this case most carefully. The circumstances in which the offence was committed were grave indeed. Having regard to the serious nature of the offence and taking into account the factors to consider when passing sentences, the Court of Appeal were unable to say that the sentence in the present case was manifestly excessive. The learned judge had in fact taken into account the appellant's plea of guilt and given a discount when passing sentence. For these reasons, this appeal was without merit (see pp 89I–90B); *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 referred.

[Bahasa Malaysia summary

Perayu telah dituduh, disabit dan dihukum kerana satu kesalahan di bawah s 304 Kanun Keseksaan. Inti pati pertuduhan tersebut adalah bahawa perayu bersama enam orang lain telah dengan niat bersama melakukan homisid salah sehingga menyebabkan kematian seorang bernama Rajasegaran. Perayu dan dua orang lain telah dihadapkan ke Mahkamah Tinggi dan dituduh. Ketiga-tiganya telah mengaku

bersalah. Hakim yang bijaksana telah mendapati perayu bersalah, telah menyabitkan beliau dan mengenakan hukuman 12 tahun penjara. Peguam bagi pihak perayu menyatakan bahawa hakim yang bijaksana telah gagal untuk mengambilkira pengakuan bersalah perayu ketika menjatuhkan hukuman dan tidak mengikut corak penghukuman yang biasa dijatuhkan dalam suatu kes seperti ini oleh mahkamah-mahkamah jenayah. Perayu membuat rayuan terhadap hukuman tersebut. Persoalannya adalah sama ada hukuman tersebut melampau.

Diputuskan, menolak rayuan dan mengekalkan perintah hakim yang bijaksana:

Mahkamah Rayuan telah menimbangkan kes ini dengan teliti. Keadaan-keadaan di mana kesalahan tersebut dilakukan adalah amat berat. Dengan mengambilkira sifat serius kesalahan tersebut dan faktor-faktor yang perlu dipertimbangkan sebelum menjatuhkan hukuman, Mahkamah Rayuan tidak boleh mengatakan bahawa hukuman dalam kes semasa adalah melampau. Hakim yang bijaksana telahpun mengambilkira pengakuan salah perayu dan telah memberikan peringanan semasa menjatuhkan hukuman. Oleh sebab-sebab berikut, rayuan ini tidak bermerit (lihat ms 89I–90B); *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 diikut.

Notes

For cases on Penal Code s 304, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1242–1247.

Cases referred to

Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)

Legislation referred to

Penal Code ss 149, 304

Appeal from: Criminal Trial No 42–32 of 1998 (High Court, Shah Alam)

K Chandra (*K Chandra & Co*) for the appellant.

Shahrizal bin Shaari (Deputy Public Prosecutor) (Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA: This is the judgment of the court.

The appellant before us was charged, convicted and sentenced for an offence under s 304 of the Penal Code read with s 149 of the same Code. The gist of the charge is that on the 10 June 1994 at about 10pm, the appellant together with six other persons had with common intention committed culpable homicide by causing the death of one Rajasegaran. The

A offence took place at Taman Dagang Jaya, Ampang. The appellant and two others were produced before the High Court and charged. All three pleaded guilty.

We are informed by the learned counsel of the appellant that the other two accused at the court below have already served the sentences and have
B been released from prison. According to the facts admitted by the appellant before the learned judge, he and six others armed with an assortment of weapons that included six parangs, a pipe and a bottle, approached the house of the victim. There they set upon their victim. Their physical attack resulted in the death of Rajasegaran. The learned judge found the appellant guilty, convicted him and imposed a sentence of 12 years imprisonment.
C The appellant now appeals to us complaining that the sentence is manifestly excessive.

Mr K Chandra of counsel for the appellant has with his usual ability argued a number of points before us. We do not think we do him injustice if we summarize his argument in a single sentence. He says that the learned
D judge failed to take into account the fact that the appellant had pleaded guilty and went against the trend of sentences usually handed down in a case such as this by the criminal courts at Shah Alam.

Before we make any comment on counsel's complaint, it is quite helpful for us to remind ourselves of the factors that a sentencing court may have to take into account when passing sentence in a given case. These have been
E summarized by so learned a judge as Mohamed Azmi SCJ in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167, at p 170:

> In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the
F presence or absence of mitigating factors, and, fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant.

G We now refer to another passage in the said judgment, also at p 170:

> A sentencer must give sufficient discount for all extenuating circumstances pertaining to the degree of culpability or criminality involved, which must necessarily vary from case to case apart from other mitigating factors. Unless there is a proper reason for withholding such credits, failure to do so may result in the sentencer not exercising his or her discretion judicially in
H assessing the level of custodial sentence.

To these elements, we would add the necessity for the court to take into account the public interest which is the paramount consideration in all sentencing cases.

We have considered this case most carefully. The circumstances in
I which the offence was committed are grave indeed. Mr Chandra with his customary frankness conceded that the facts disclose pre-meditation. This is therefore not a case of chance medley where the victim and the appellant

know each other. Having regard to the serious nature of the offence and taking into account those factors which we have referred to a moment ago, we are unable to say that the sentence in the present case is manifestly excessive.

As our learned brother Abdul Kadir Sulaiman JCA pointed out in the course of the argument, it would appear even from a mere arithmetical calculation, that the learned judge had in fact taken into account the appellant's plea of guilt and given a discount when passing sentence. For these reasons, we find it unnecessary to call on the learned deputy public prosecutor to respond to the appeal. This appeal is without merit, it is dismissed and the order made by the learned judge is affirmed.

Appeal dismissed and order affirmed.

Reported by Ezatul Zuria Azhari